IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Saskatchewan)

BETWEEN:

ANDRÉ MERCURE

Appellant

- and -

THE ATTORNEY GENERAL OF SASKATCHEWAN

Respondent

- and -

LA FÉDÉRATION DES FRANCOPHONES HORS QUÉBEC
L'ASSOCIATION CANADIENNE-FRANÇAISE DE L'ALBERTA
L'ASSOCIATION CULTURELLE FRANCO-CANADIENNE DE LA SASKATCHEWAN

Intervenants

- and -

THE ATTORNEY GENERAL OF ALBERTA

Intervenant

- and -

FREEDOM OF CHOICE MOVEMENT

Intervenant

FACTUM OF FREEDOM OF CHOICE MOVEMENT

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PART I
STATEMENT OF FACTS

1. FOCM adopts the statement of facts set out in the factum of the principal party.

2. By order of the Honourable Mr. Justice LeDain, October 22, 1986, FOCM was granted leave to intervene in the present appeal and to make submissions on questions 5 and 6.

PART 11

POINTS IN ISSUE

QUESTION 5: If the answer to question 1 is affirmative, does s. 110 of the Northwest Territories Act require that the proceedings be conducted in English or French at the option of the accused or defendant?

INTERVENANT'S POSITION: YES

QUESTION 6: If the answer to question 4 is affirmative, does the right to use either English or French before the Courts of Saskatchewan include, by virtue of s 110 of the Northwest Territories Act, the right to be understood by the Judge or Judge and jury without the assistance of an interpreter or simultaneous translation?

INTERVENANT'S POSITION: YES

PART lll

ARGUMENT

Section 110 of the North-West Territories Act

1. Questions 5 and 6 of the present appeal fall to be decided on the interpretation given to s. 110 of the North-West Territories Act, which, so far as material, provides:

> 110. Either the English or the French language may be used by any person ... in proceedings before the courts;

2. It is submitted that s. 110 entrenches the same substantive protection as other guarantees for official bilingualism. Minor textual variation in official bilingualism guarantees is a "difference...only of form not of substance."

> Société des Acadiens du Nouveau Brunswick v. Assn of Parents, [1986] 1 S.C.R. 549, 572
>
> Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, 743-4 ("Given the similarity of the provisions, the range of application of s. 23 of the Manitoba Act. 1870, should parallel that of s. 133 of the Constitution Act, 1867".)

Principles of Interpretation

3. Proper interpretation of a constitutional guarantee requires "a broad purposive analysis ... in light of its larger objects" and requires the Court "first ... to specify the purpose underlying [the specific provision]" (Hunter v. Southam, [1984] 2 S.C.R. 145, 155. This method applies equally to interpretation of language rights. As explained by this Court in the Manitoba Language Rights Reference, [1985] 1 S.C.R. 721, 751:

> This Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution.
>
> see also:
>
> Société des Acadiens v. Assn. of Parents, [1986] 1 S.C.R. 549, 562, 564 per Dickson, C.J.C.

Purpose of S. 110

4. This Court explained the purpose of official bilingualism guarantees in the Manitoba Language Rights Reference, supra, p. 739:

> ...the purpose of both s. 23 of the Manitoba Act. 1870 and s. 133 of the Constitution Act. 1867 was to ensure full and equal access to the legislature, the laws and the courts for francophones and anglophones alike; (emphasis added).

5. This Court, and all courts which have considered language guarantees, repeatedly emphasize that, as far as the guarantees extend, the English and French linguistic communities must be treated equally. They must receive equal treatment in the sense that one language or linguistic group cannot be preferred over the other.

> Jones v. A.G.N.B., [l975] 2 S.C.R. 182, 195 ("In establishing equality of use of the two languages, s. 133 did so ... in specified Courts")
>
> MacDonald v. City of Montreal, [1986] 1 S.C.R. 460 (per Beetz J, at p. 500: Not only are the

> English and the French languages placed in a position of equality, they are also given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s. 133 of the Constitution Act. 1867. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title I of the Charter of the French Language, invalidated in Blaikie no. 1.". per Wilson J, at p. 538: "The purpose of the constitutional guarantee ... would appear to be to put the two languages on an equal footing (see Jones at p. 195) and afford protection to each of the two founding linguistic groups from the intrusion and ultimate dominance of the other...").
>
> Reference re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1, 43 (C.A.) ("The quality of education provided to the minority is to be on a basis of equality with the majority".)
>
> Marchand v. Simcoe County Bd. of Educ. (1986), 55 O.R. (2d) 638, 660 (There are no unequal rights under our Charter. The framers did not enshrine in the constitution a lesser right, an inferior right for the minority, in s. 23 ...".)

6. The equality principle in s. 110 is reinforced by s. 15 of the Charter of Rights, whether applied as an interpretational tenet to s. 110, or as a free standing guarantee.

Ref. re Education Act of Ontario, supra, p. 39

Equality Principle

7. Section 110 protects the use of the French and English languages in proceedings before the courts. The equality principle in s. 110 means that Saskatchewan cannot, by simple legislative enactment, give a degree of preference to English, as, for example, by prohibiting the use of French, or by creating significant legislative obstacles to the use of French.

MacDonald v. City of Montreal, supra, per Beetz J, at p. 500

8. It follows that Saskatchewan cannot accomplish the same purpose indirectly, as, for example, by prohibiting French administratively, or by creating significant administrative obstacles to the use of French.

9. Nor can Saskatchewan fail to remove significant administrative obstacles to the use of French on the argument that Saskatchewan did not create these obstacles intentionally. Equality claimants under human rights guarantees do not have to prove intention to discriminate. Inequality in fact is sufficient to make out the case.

> "The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination....To take the narrower view and hold that intent is a required element of discrimination ... would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy".

Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536, 549

Bhinder and Canadian Human Rights Commission v. C.N.R., [1985] 2 S.C.R. 561, 586

Language rights are a well known species of human rights, and should be construed accordingly.

> International Covenant on Civil and Political Rights. 1966, art. 27
>
> M. Tabory, Language Rights as Human Rights (1980), 10 Israel Y.B. of Human Rights 167

10. It is submitted that intentional or adverse effects discrimination against the French linguistic community in its protected access to the Courts violates the equality principle contained in s. 110.

Applying the Equality Principle

11. The Saskatchewan Bench and prosecutorial Bar are overwhelmingly anglophone. Unless questions 5 and 6 in the instant appeal are answered in the affirmative, Saskatchewan francophones who chose to exercise their s. 110 right to speak French in proceedings before the courts will receive interpreted trials. Saskatchewan anglophones, by contrast, will be addressed by the prosecutor and understood by the Judge in their own language. Father Mercure was offered an interpreted trial in the instant case.

> Stated Case, Case on Appeal, p. 5, 6

For the reasons in para. 12, it is submitted that interpreted trials, conducted with a Judge and prosecutor who do not understand French directly, are an inferior alternative to the English trials provided to anglophones, and thus violate the equality principle contained in s. 110 as buttressed by s. 15.

12. The trial process is a crucible of truth. Trial effectiveness depends on exactness of communication and precision of inference. Interpreted trials are beset by fundamental difficulties which greatly diminish their effectiveness as a discoverer of truth. It is submitted that interpreted trials are a discriminatory -- and avoidable -- alternative to direct comprehension by the Court for the following reasons:

(a) Use of an interpreter imposes a barrier between the speaker and the Court, necessarily involving substitution of meaning and nuance. This results in less exact communication and less precise inference.

> The Right to an Interpreter (1970), 25 Rutgers L. Rev. 145, 167 ("It is impossible to bring a non-English-speaking accused to the position enjoyed by an English-speaking defendant in a criminal proceeding. The former will be at a disadvantage, even when assisted by a competent interpreter, for language, chameleon-like at its inception, may lose many of its fine distinctions when filtered through the additional medium of an interpreter. The speakers' mood, inflection, and demeanor are likely to be lost when the interpreter relays testimony to the accused or to the court.")
>
> Cormier v. Fournier (1986), 69 N.B.R. (2d) 155, 166 ("Despite the interpreters' expertise, interpretation does not provide an image which is true to the original. The interpreter must make choices and exercise his judgment.")
>
> Robin v. Le College de St-Boniface (1984), 15 D.L.R. (4th) 198, 207 (per Monnin CJM dissenting on other grounds: "Without that ability [to understand directly], there will always exist the legitimate fear that the witnesses and the parties will not be thoroughly understood and that the nuances of language, intonation, accents, local expressions or colloquialisms will overshoot the ears of the trier of facts.")

(b) The barrier between the court and witnesses makes it especially difficult, if not impossible, for the court to assess the credibility of witnesses.

> State v. Vasquez, 121 P. (2d) 903, 908 (Utah Sup. Ct., 1942) (per Wolfe J, speaking of evidence translated from Spanish: Certainly the reaction of a witness, his demeanor on the stand, is much more discernible to [the trier of fact] when questions and answers are framed in English.")
>
> Clarke v. Edinburgh & District Tramways Co., [1919] S.C. 35, 37 (H.L.) (per Lord Shaw: "Witnesses without any conscious bias towards a conclusion may have in their demeanor, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced...")

(c) Interpretation makes exercise of the right of cross examination virtually impossible.

> Bergenfield, Trying Non-English Conversant Defendants: The Use of an Interpreter (1977-78), 57 Ore. L. Rev. 549, 553 ("When a court interpreter is used, a prosecutor has written, it is practically impossible to cross-examine ... for the whole psychological significance of the answer is destroyed. If the defendant is marginally conversant in English, he can gain time to consider his answers. Damaging conflicts in testimony become less likely;" (citations omitted).
>
> Government of New Brunswick, Toward Equality of the Official

> Languages in New Brunswick, Report of the Task Force on Official Languages, 1982, p. 661 ("...simultaneous translation is not effective in a trial situation, chiefly owing to problems associated with electronic apparatus and also the difficulty of translating rapid exchanges between two or more persons in a trial, thus rendering cross-examination virtually impossible. Experience shows that interpreters often experience difficulty in following a trial, and give an incomplete translation; this is unacceptable in a 'profession of words'.")
>
> Barristers' Society of New Brunswick, Committee on Integration of the Two Official Languages in the Practice of Law, Sept., 1981, p. 64 (This Report was reviewed by Wilson J. in S.A.N.B., supra, p. 622, who concluded that the views in the Report "certainly seem to suggest that simultaneous translation and perhaps consecutive translation also would place a litigant at a disadvantage at least in trial proceedings...")

(d) Linguistic minorities subject to interpreted trials suffer more severe sentences for the same offences.

> New Jersey Supreme Court Task Force on Interpreter and Translation Services, Equal Access to the Courts for Linguistic Minorities (Final Report), May 22, 1985, p. 54-5.

(e) Lawyers exercising their right to speak French in Saskatchewan Courts, whose words must be interpreted, give up one of their most valuable assets -- their ability to use words for their emotive and connotative import.

(f) Competence of interpreters is a persistent problem, particularly in smaller communities. There are no standards by which to test an interpreter's competence, nor accepted accrediting bodies. Judges are meant to assess the abilities of interpreters. This is impossible if the Judge is not himself bilingual.

> Unterreiner v. The Queen (1980), 51 C.C.C. (2d) 373, 379 ("There is precious little case law authority on the question of the credentials of and procedures for the swearing in of an interpreter in a trial or related proceeding." This case offers a pointed example. The competence of the interpreter was challenged only when the applicant, who himself knew some German, realized that the interpreter translated "violent" as "nervous". This had escaped the notice of the Judge and lawyers.)

(g) Appeals on points of mistranslation are impossible. The trial record does not contain both original and interpreted versions of the evidence, thus making comparison unreviewable in an appellate court.

13. The inequality produced by interpreted trials is easily remediable by Saskatchewan, causing inconvenience or difficulty to nobody. In order to remedy the inequality

> There is no need for all Judges, lawyers and court staff to be fully bilingual. There is an urgent need and a constitutional requirement for a few Judges, lawyers and court staff who can function in either English or French.
>
> Robin v. Le College de St-Boniface, supra, p. 208.

Saskatchewan Judges have recognized that these resources are already in place, and can easily be deployed to meet the small demand of French speaking litigants.

> R. v. Tremblay (1985), 41 Sask. R. 49, ("I have no doubt that at the accused's hearing a bilingual judge will be provided by the Chief Justice, and there is no reason why bilingual court staff cannot be made available..." (p. 55); "The Court of Queen's Bench for Saskatchewan is able to provide a French speaking judge for the purposes of s. 462.1 [Crim. Code]. Bilingual court staff is available. I have no doubt bilingual prosecutors could be retained by the province. Nothing of significance remains to hamper the holding of a criminal trial in the French language in this court in Saskatchewan. Any allegation that there are insufficient French speaking judges on the court is spurious. One judge is enough considering the anticipated volume of French trials. If the volume increases, then more bilingual judges could be demanded;" pp. 57-8.)

Implementing the Equality Principle

14. In Blaikie no. 1, [l979] 2 S.C.R. 1016, 1030 this Court held that judgments and other orders may be issued and published in either English or French. In MacDonald v. City of Montreal, [1986] 1 S.C.R. 460, 484 this Court held that the language rights of court officials to choose either language in addressing litigants are constitutionally protected. Do these rulings conflict with the equality principle inherent in s. 110?

15. If it were to be found that most or all French litigants received judgments in English, a plausible case of inequality might be made out. So too, if most or all French litigants were addressed by court officials in English, a plausible case of inequality might be made out.

16. If these implicit problems were presented subsequently, the Court would have several options to

remedy the alleged inequality without diluting what was said in Blaikie and MacDonald. While judges would obviously retain the right to deliver judgment in the language of their choice, Saskatchewan might be obliged to provide official translations of judgments, or, less strenuous, to provide official translations to French speaking litigants in causes in which they were involved on request. Again, while judges and prosecutors would retain the right to address litigants in either language, Saskatchewan might be obliged to arrange prosecutorial and judicial assignments such that French speaking judges and prosecutors were available on request. Thus, it is submitted, the equality principle inherent in s. 110 may be fully implemented without encroaching on the language rights of court officials as expounded in the Blaikie and MacDonald cases.

S.A.N.B. and MacDonald Cases Distinguished

17. This is not a case like Société des Acadiens du Nouveau-Brunswick v. Assn. of Parents, [1986] 1 S.C.R. 549. In S.A.N.B. the question was "whether the right to choose which language to use in court includes the right to be understood by the judge or judges hearing the case" (S.A.N.B., p. 559). No submissions were made about denial of equality under official bilingualism guarantees, nor did the Court address that issue in its reasons. S.A.N.B. concerned an appellate proceeding, not a trial. French trials are available in New Brunswick on request (Official Languages of New Brunswick Act, R.S.N.B. 1973, c. 0-1). In S.A.N.B. Stratton J. was found to have a sufficient command of French. So there could have been no question of systemic or adverse effects discrimination in that case.

By contrast, no claim is made in these submissions that the right to use French in s. 110 includes the right to be understood. The sole claim is a denial of equality because of systemic or adverse effects discrimination in providing the French linguistic community with inferior interpreted trials. The present case concerns a trial, not an appeal. No submission is made as to whether the same adverse effects would be suffered by interpretation in an appellate proceeding (and some of the authorities cited above suggest that they would not). French trials are not available in Saskatchewan. The request for a French trial was denied in the present case.

18. In MacDonald v.City of Montreal, supra, the issue was whether the right to use English before the Courts of Quebec gave the appellant the right to be summoned in the English language. This Court rejected the appeal because it held that the right to use either language is the right of the person who speaks, not the right of the person spoken to (p. 483). The right "does not guarantee that the speaker...will be understood in the language of his choice by those he is addressing;" (p. 496). No argument was addressed to, nor did this Court's reasons explore, any claim of a denial of equality implicit in implementation of s. 133. Again, the instant submission is founded only on a claim of denial of equality. No claim is made to a right to be understood implicit in s. 110.

PART IV

ORDER REQUESTED

19. Intervenant respectfully asks that this Honourable Court answer questions 5 and 6 in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at OTTAWA,
Ontario, this
10th day of
November, 1986

JOSEPH ELIOT MAGNET, ESQ.
Counsel for the Intervenant,
Freedom of Choice Movement

LIST OF AUTHORITIES
